United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-1437

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United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

ANTHONY L. CAVALLARO,

Appellant.

On Appeal From The United States District Court For The Northern District of New York

Appellant's Brief

JOEL A. SCELSI
Attorney for Appellant
2609 East Main Street
Endicott, N.Y. 13760
(607) 748-8266

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

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OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

ANTHONY L. CAVALLARO,

Appellant

BRIEF FOR THE APPELLANT
ANTHONY L. CAVALLARO:

PRELIMINARY STATEMENT:

This is an appeal undertaken in behalf of Anthony Cavallaro from the judgment of conviction had in the United States District Court, Northern District of New York, before a judge and jury (Hon. Lloyd F. MacMahon, District Judge) for the crime of kidnapping under 18 U.S.C. 1201(a) and 2.

As a consequence the appellant was sentenced to a 25 year jail term.

STATEMENT OF THE ISSUES
PRESENTED FOR REVIEW:

A. Did the acts attributed to the appellant constitute kidnapping under 18 U.S.C. 1201(a)?

B. Did the Court deny the appellant's right to confrontation by limiting cross examination in violation of the 6th Amendment to the Federal Constitution?

C. Was the appellant denied a fair trial when the Court allowed evidence of an unrelated crime, e.g. a shooting, in violation of due process and appellant's right to a fair trial

under the 5th Amendment to the Federal Constitution?

STATEMENT OF THE CASE AGAINST
THE APPELLANT ANTHONY CAVALLARO:

Prior to the commencement of the trial, appellant's attorney applied to the Court for the address of the prosecution's principal witness, Mary Shepardson (1-3)*. This request was denied, the Court indicating that if counsel asked the witness when she testified he would sustain the prosecutor's objection and he would hear the answer "in camera". The Court indicated that that wouldn't be the best method because "the whole idea is not to disclose here whereabouts. And I don't see any materiality. ..." (3).

The trial then proceeded and the government called Mary Shepardson as its first witness (4). She was 24 years of age. She formerly lived in a trailer village in Endicott, New York with her son 1-1/2 years of age (4, 5). She also had a friend named Debbie Buchanan (6).

On December 10, 1975 she went to Buchanan's house. Buchanan at that time was living with a "Dick Finch" (6). A party by the name of Sampson also lived in the same building where Buchanan's apartment was located (8). Her purpose

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*( ) This refers to the pagination of the appendix served and filed by the appellant.

going to Buchanan's house was for Buchanan to babysit so that she could procure some fuel for the trailer that she lived in. She was going to the welfare agency for this (8-10). In order to go to the welfare agency she hitchhiked and was picked up by the appellant whom she knew for the past year (10, 11).

At the welfare agency her fuel request was denied and she returned and asked "Dick Finch" to help her look for fuel. She was unsuccessful in this venture and she returned to Buchanan's house. From there she went on another errand to buy some food. When she returned Buchanan told her that in her absence she received a phone call. Buchanan told her to stay in the house, (13). Remaining at Buchanan's house, the co-defendant Brown appeared. She couldn't identify Brown in Court but did identify the appellant (13-15). Brown "told her" to go outside in that Dave Baer was there and he wanted to talk to her (15, 16). Ultimately she was told to "get" in a car that Baer was in and she added that "we" were going for a "ride" (16). Baer was seated in the rear of the car, the appellant was driving the car, and she sat next to the appellant in the front (16). She described Baer's face as appearing "swollen" and he appeared "scared" (16, 18). The purpose of the ride according to Shepardson was to "talk" (19). She initially thought that Baer wanted to talk to her and this was the reason she left the house (19, 20). She also testified that she had no choice but to get into the car (19).

While driving the appellant told her he was tired of being "ripped off" (21). Brown added that she should tell the truth and that he was hired to"kill her" by the appellant (21). In the car the appellant displayed a weapon (22, 23). The defendants also told her that they wanted their money given as to a previous sale of "pot" (22).

Ultimately the appellant called her a liar, stopped the car and displayed a gun (23). Then the witness disclaimed any knowledge and the co-defendant Brown told defendant to desist as it was the co-defendant's "job" and that "he would take care of it" (23). She was told that they were going to the "Circle of Life" (23). This was some establishment in Pennsylvania (23). Brown also told her to divulge the persons who eventually defrauded the appellant if she wanted to "see her son" (24).

The car stopped and Baer and she were told to line up. Both defendants displayed weapons. Shots were fired by Brown (24, 25).

Then Brown told th appellant that the witness was "okay" because she didn't "show anything". All returned to the car, Brown telling her that he "saved" her life. They then went to some bar in Pennsylvania (24, 25). Shepardson was told not to say anything. At any rate they stayed at the bar for about an hour and a half (26). Ultimately they drove to Baer's apartment, the witness stayed there for a little while, and then they all went to Buchanan's apartment (26). At Buchanan's apartment inch was present (29). She told Finch about the occurrence had another glass of beer and fainted (30).

Neither she nor Finch ever called the police when she returned from the automobile ride to Pennsylvania (71, 72).

She also admitted that in Pennsylvania when they all stopped at a bar, they drank and talked about the appellant's problem (73). There were other patrons in the bar but she never spoke to them (73).

She described the automobile ride to Pennsylvania placing herself in the front while Brown, in the back, held her hands. She spoke to Brown during the ride, stating she turned around to do so (74). She also admitted that she could have left Buchanan's house prior to the appellant's arrival (75).

She also had trouble with the welfare authorities when they took her child. They returned the child when she told them she was going to marry Sampson but then she never married him after all, instead she left him (76, 77).

When Buchanan initially told her that the defendants were coming to talk to her, she never called the authorities (80, 81).

She admitted that Jerry Brooks committed the "rip off" (82). She was more candid in her cross examination about her relationship with Baer stating that he was her former "boyfriend" (84).

When she was interviewed by the authorities, after the incident, she didn't tell them about her hands being held by Brown (87, 88). She also admitted that Brooks visited her in the trailer but that he never spent the night with her (90, 91).

Then in order to show her statements prior to her testimony in court she was cross examined as to such statements that she made to the authorities about her narcotic dealings (Appellant's Exhibit A, 98-100).

Finch testified on direct examination that on December 10, 1975 he was living with Debbie Buchanan (104, 105). On the morning of December 10, 1975 Finch was home (105). The appellant and Baer visited him (105). Shepardson, the previous witness, was there, but she left (105, 106). The appellants and Baer wanted to see Sampson in order to locate Jerry Brooks (106, 107). They told the witness that "Jerry" ripped them off (107). All went to Sampson's apartment, Finch helping them to gain entry by forcing the door (107-108). Finch was slightly afraid of the defendants (108). They left Sampson's apartment. The next morning at about 12:45 Finch returned from work (110). Buchanan and two children were at the apartment (110). Shortly thereafter the appellant and Shepardson arrived. The appellant was carrying a pistol (112). Finch never called the authorities. He knew that Shepardson was formerly living with Sampson (115, 118). Furthermore, he previously told the authorities that Brooks and Sampson were "rip off" artists (119). On occasion Shepardson and Brooks were in Sampson's apartment (119). When the appellant was at Finch's apartment, earlier namely on December 10, 1975, he spoke to Shepardson in regard to Sampson and Brooks (120).

Debbie Buchanan testified that was divorced from Finch (129). She described the visit to her house earlier on December 10, 1975 (123). From her house the appellant called his wife and told her to bring a gun over to Buchanan's apartment. Ultimately the appellant's wife did this (124, 125). She described how the appellant asked Finch to help get into Sampson's apartment (125, 126). Later Brown, the co-defendant, entered the apartment and this witness saw a gun on his person (128). When Shepardson and the others left they entered a car and Buchanan observed Brown holding Shepardson's arm (128). The witness then called Sampson (129).

On cross examination this witness retrieved a note from Sampson's apartment. It was signed by Jerry Brooks (133). The note is described on page 134 of the appendix and referred to a "rip off" of some "freaks" from Binghampton (134).

At her apartment Shepardson called Brooks and told him not to come to the apartment because "some people were waiting for him" (135, 136). Buchanan knew that Cavallaro was going to return to the apartment (136, 137). Furthermore she told this to Shepardson (137). When Brown returned there was a conversation about children (137). Baer was her cousin (138). When Shepardson left with Brown the witness called Sampson (140, 141). Four years prior to this incident, Buchanan also lived with Sampson (141).

Next, Richard Sampson testified (142). On direct examination he related the evening of December 10, 1975 and the early hours of the morning of December 11, 1975. That period of time he was at home (142). Brown visited him. While he didn't know Brown, he did know the appellant (143, 144). While Brown was there he pointed a gun at him (145). Brown told the witness that he was there for "Tony". The witness knew that the visit was about the "rip off" (146). Sampson and Brown then went to the appellant's house (146). There Brown shot him (147). On further examination he testified that on December 10, 1975 he told Shepardson that he knew she was involved in the "rip off", mentioning Jerry Brooks as being the perpetrator and that Jerry Brooks was a fraud. Sampson also told Shepardson that Brooks didn't sell "good dope" (150, 151). On previous occasions Sampson saw Shepardson with Brooks. Shepardson also told Sampson that she didn't care who was "ripped off" as long as she got paid (152).

When Shepardson visited this witness in the hospital after kissing him she told that she had got him "out of it" and that she had "everything under control" (155).

Next, David Baer testified. On direct examination he stated he knew the appellant (155). That on December 9th or 10th, 1975 he was visited by the appellant who was with the co-defendant (156). Brown did most of the talking inquiring as to where he could locate a Jerald Brooks and David Lamont (158). He also indicated a desire to speak to Shepardson (159).

The defendants left and this witness saw them later that evening (159). Ultimately the appellant and co-defendant met him and he went into an automobile with them (160, 161). They went to Buchanan's house to meet Shepardson (161). The appellant drove the car and the co-defendant was a passenger and asked Baer whether Shepardson had anything to do with the "rip off" (161, 162).

He then described the ride to Pennsylvania involving Shepardson (162). While driving Brown, the co-defendant, was "riding" Shepardson (162). At any rate the car stopped because the witness had to go to the bath room (162, 163). When Shepardson was asked about the "rip off" she disclaimed any knowledge of it (163, 164).

When the car was stopped the appellant and Baer left the car and Baer told the appellant to leave Shepardson alone and put pressure on him; also to shoot some random shots in the air. Brown obliged by telling Shepardson and Baer to stand against the side wall. This witness knew that this was just a pretense. At any rate, Brown fired some random shots and the appellant said it's enough and they all went into the car (164, 165). Brown in firing the shots did not aim his gun at anybody (165). Baer stated the purpose of this was that if Shepardson saw that he was being coerced, she might relent and state what she knew about the "rip off" (165, 166).

Baer also related on cross examination that Shepardson was thinking of going to Colorado with Brooks (168). Baer also told Shepardson on December 10, 1975 that they were all going to pick her up to talk to her but they didn't want to talk to her in Buchanan's apartment and didn't want to make a "big scene" (168). Furthermore that Brown never applied any force to Shepardson (169). Further that Brown opened the door for Shepardson and he didn't push her into the car, (170). Further on the ride Brown never held Shepardson's hands (170). Baer also stated that Shepardson was "cooperative all along" (173). Upon questioning by the Court, Baer stated that Shepardson called Brooks' wife to get the correct address (174). Further that Shepardson did not appear frightened and that he knew that she knew the appellant for a year previously (174).

On re-direct examination Baer described his acquaintance with Brooks and one Lamont (175). He related that they were friends of Shepardson and that he introduced them to the appellant (175, 176). Further that before the car went to Pennsylvania Brown knew Brooks' address as Shepardson told him that the appellant didn't know the address (173). That the purpose of the car ride was to converse (176). Baer previously told the FBI that Shepardson was hysterical (176, 177). That is, he stated that he could have told that to the FBI (177). Confronted with a report of the FBI dated December 18, 1975 at the page designated 25 and 3, this witness stated he told the FBI that Shepardson was hysterical (178).

Ronald C. Steele testified that he lived in Springfield, Pennsylvania and was questioned by one of the authorities as to an incident that occurred on the evening of December 10, 1975 (183). The substance of his testimony was that he was a bartender in Pennsylvania and that at midnight or even before that, of December 10, 1975 four persons entered the bar (184). He identified the defendant Brown, the appellant, and described a lady with the appellant as being short with reddish colored hair (184, 185). He observed nothing unusual about them, they were strangers to him, (185). He recalled that they all left the bar at about 1:30 in the morning and also stated that the lady was drinking scotch (187).

POINT I.

THE OCCURRENCES WERE NOT WITHIN THE MEANING OF 18 U.S.C. 1201(A) IN THAT THE PURPOSE OF THE TRANSPORTATION OF THE WITNESS WAS TO GAIN INFORMATION FROM HER AND TO HOLD TO THE CONTRARY RENDERS 18 U.S.C. 1201(A) VOID FOR VAGUENESS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 5TH AMENDMENT TO THE FEDERAL CONSTITUTION BECAUSE THE SAID STATUTE DOES NOT GIVE PROPER NOTICE AS TO WHAT THE WORD "OTHERWISE" AS CONTAINED IN THE SAID SECTION DESCRIBING THE PURPOSES OF THE KIDNAPPING.

Appellant claims that the expression "otherwise" contained in 18 U.S.C. 1201 (a) does not give notice as to what is forbidden, is therefore vague, and operates to give the statute an ex post facto effect.

The facts of this case more aptly described as a"Tour De Force" indicates that Shepardson was part of a "rip off" initiated by Brooks. That the acts attributed to the appellant show a complete lack of wisdom does not, it is suggested, come within the meaning of the statute. In Chatwin v. U.S., 326 U.S. 455 (1945) the Supreme Court considered the phrase "or otherwise". The facts of the case disclosed that the petitioners induced a 14 year old girl with a possible 7 year old mentality to leave the custody of the state juvenile court and live with one of the petitioners who was of the Mormon faith, in what is described as a "celestial marriage". The Court held that the statute in its relevant portion (which coincide with the relevant portions of 18 U.S.C. 1201(a)) was not violated.

Firstly the Court held there was no restraint even though the victim may have been of non-age and of low mentality; then the Court went on to analyze the purpose of the restraint e.g. financial gain or "otherwise" at pages 460, 462. At pages 462-463 it was held in part that:

> "The stipulated facts of this case reveal a situation quite different from the general problem to which the framers of the Federal Kidnapping Act addressed themselves. This statute was drawn in 1932 against the background of organized violence... Kidnapping by that time had become an epidemic in the United States. Ruthless criminal bands utilized every known legal and scientific means to achieve their aims and to protect themselves. Victims were selected from among the wealthy with great care and study... Ransom was the usual motive..." (Emphasis supplied, internal quotations and citations omitted).

At page 464 it was stated in part that:

> "But the broadness of the statutory language does not permit us to tear the words out of their context, using the magic of lexigraphy to apply them to unattractive or immoral situations lacking the involuntariness of seizure and attention which is the very essence of the crime of kidnapping. ...No unusual or notorious situation relating to the inability of the state authorities to capture and punish participants in such activities evidenced itself at the time this Act was created; no authoritative spokesman indicated that the Act was to be used to assist the state in these matters, however unlawful and obnoxious the character of these activities may otherwise be. Nor is there any indication that Congress desired or contemplated that the punishment of death or long imprisonment, as authorized by the Act might be applied to those guilty of immorality is lacking the characteristics of true kidnapping... And the broad language of the statute must be interpreted and applied with that plain fact of mind." (Emphasis supplied, internal citations and quotations omitted).

"Were we to sanction a careless concept of the crime of kidnapping or were we to disregard the background and the setting of the Act the boundaries of potential liability would be lost in infinity. A loose construction of the statutory language conceivably could lead to the punishment of anyone who induced another to leave their surroundings to do some innocent or illegal act of benefit to the former, state lines subsequently being traversed. The absurdity of such a result, with its attendant likelihood of unfair punishment or blackmail is sufficient by itself to foreclose that construction." (At pages 464-465 of 326 U.S. 455.)

It would seem that the prime purpose of the statute was financial reward for the offender. For the succeeding statute found in 18 U.S.C. 1202 makes it a federal crime for a person to receive, possess or dispose of money or property which was delivered as ransom or reward in connection with the kidnapping under 18 U.S.C. 1201. As was stated in U.S. v. Ortega, 517 F. 2d 1006 (Cir., 3d, 1975) at page 1010 it was stated:

"The offense described in Section 1202 is an amendment to the Federal Kidnapping Act and was enacted at the suggestion of the Attorney General, who noted that the then existing law was inadequate to reach persons handling ransom money. Ransom was the usual motive for kidnapping, and penalties for knowing and possessing the fruits of the crime are logical and necessary to discourage commission of the underlying offense..." (Emphasis supplied)

It is respectfully put that recent decisions of the United States Supreme Court as hereinafter shown have dealt in depth with the issue of statutory vagueness especially in penal statutes.

Thus words with a more restrictive meaning in certain statutes did not cure the defect of the vagueness of the statutes. In Palmer v. Euclid, 402 U.S. 554 (1971) the Supreme Court deemed the statute vague in lacking definite standards of guilt where the statute provided that:

> "...Any person who wanders about the streets or other public ways or is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself..."

So also in Papachristo v. Jacksonville, 405 U.S. 156 (1972) the Supreme Court held that a conviction under the vagrancy statute was void because the statute failed to give a person of ordinary intelligence proper notice that the conduct was forbidden and also because the vagueness of the statute stimulated arbitrary and eratic arrest, resulting in convictions. In other words, where the statute is vague the average person is subject to the caprice of the authorities in making arrests and procuring convictions.

POINT II:

APPELLANT WAS DENIED HIS RIGHT OF CONFRONTATION AND RIGHT TO CROSS EXAMINE THE GOVERNMENT'S PRINCIPAL WITNESS, WHEN THE COURT INDICATED THAT IT WOULD SUSTAIN A GOVERNMENT OBJECTION TO DEFENSE COUNSEL QUESTIONING THE GOVERNMENT WITNESS AS TO WHERE SHE WAS RESIDING.

Unlike the usual motions to suppress evidence, so endemic to criminal actions, this issue deals with the defense wanting to disclose evidence.

At the very inception of the trial an issue arose as to the disclosure of where Shepardson was residing at the time of the trial (1). Counsel explained that she was "secreted" (or re-located) and that the defense didn't know where she was. The defense also stated that this issue was related to the issue of her credibility and whether the government offered her anything for her testimony (2). The Court told counsel not to inquire of her unless it was "absolutely" necessary and then told the government "to object" in such event (3). The Court went on to declare that in the event the question was asked in front of the jury, the Court would discharge the jury, hear the answer, and then the Court disclaimed this (3).

In this case the government had two witnesses who could relate the occurrences in the ride to Pennsylvania. Namely, Shepardson and Baer. Baer, it is submitted, was not very helpful to the government and his testimony may have been quite detracting from the government's case. Hence Shepardson was the principal witness who testified as to the ride.

By having relocated Shepardson the government deprived counsel of the right to investigate this case well in advance of trial for the purposes of a more meaningful cross examination, procuring other witnesses, procuring leads that could have buttressed the defense. This Court has recently ruled that even pre-trial disclosure of the identity of witnesses may be proper; see U.S. v. Cannone, 528 F. 2d 296 (Cir. 2d, 1975), at pages 299-300; IBM v. Edelstein, 526 F. 2d 37 (Cir. 2d, 1975), at page 44. In other words, nobody owns a witness.

In Smith v. Illinois, 390 U.S. 129 (1968), defense counsel asked a witness for the prosecution whether the name he had given in identifying himself was his true name and the witness responded that it was not and then an objection to further inquiry as to the witness' identity was sustained. It was held that the petitioner had been denied his right of confrontation. The Supreme Court noted at first that while other witnesses corroborated this witness' testimony, only that particular witness and the petitioner testified to the main events inside the locale of the crime and that their versions were different. Consequently the issue at trial was the credibility of the government's witness. On cross examination the witness was asked what his true name was and he stated that the name he used was not his true name. The Court then

sustained an objection as to what the correct name was and then sustained another objection when the witness was asked where he lived (390 U.S. 130, 131). On page 131 it was stated in part that:

> "In the present case there was not, to be sure, a complete denial of all right of cross-examination. But the petitioner was denied the right to ask the principal prosecution witness...where he lived, although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting point in exposing falsehood and bringout out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross examination itself."

Objectivity requires that counsel cite U.S. v. Marti, 421 F. 2d 1263 (Cir. 2d, 1970) where this issue arose but this Court noted that the government prosecutor offered to communicate the address of the witness privately to defense counsel. On page 1266 this Court noted that the address was not really relevant as to the credibility of the witness. But then this Court also indicated that defense counsel could have ascertained the address by asking that of the prosecutor privately and didn't do so, this Court then concluding that there might have been a waiver.

See also U.S. v. Persico, 425 F. 2d 1375 (Cir. 2d, 1970) at page 1284 where this Court stated that:

> "It was primarily out of fear for the witness' personal safety that Judge Dooling limited cross-examination. After his conviction at the second trial, but before sentencing, a co-defendant... was shot dead. The third trial was aborted...because Persico was shot and wounded..."
>
> "In the case of the witness Vaccaro, the limitation is further justified by the fact that he was well known to all defendants and their counsel, having testified at the four previous trials. His background was explored in great detail on cross-examination and the defense was informed of the nature of Vaccaro's activities. Moreover, the defense showed no particularized need for the information requested ...Cancelli was known to the defense since he testified at the fourth trial. His testimony was not of central importance..."

In this case it is submitted that there was a great need for this information. Thus Sampson testified that when Shepardson visited him in the hospital after kissing him she asked him why he got involved and then she added that she "had everything under control...".

It's very easy for a witness to take the stand and testify as to a state of mind denoting fear and testifying as to being victimized by coercion resulting in a kidnapping or being tricked into taking a ride. The crucial issue in this case was whether Shepardson consented to the ride. Cross examination did show that Shepardson was pretty sophisticated and that notwithstanding her youth, she was an experienced young woman.

Knowing where Shepardson resided at the time of trial would have enabled the defense to search out witnesses who could perhaps shed more light on whether Shepardson was cajoled into taking the fateful ride, or forced to take it. After all she did tell Sampson that she was in control of the situation namely the consequences of the defrauding of the defendant.

POINT III:

THE APPELLANT'S RIGHT TO A FAIR TRIAL WAS SEVERELY PREJUDICED WHERE THE COURT PERMITTED TESTIMONY BY SAMPSON, A GOVERNMENT WITNESS, THAT HE WAS SHOT BY BROWN, THE CO-DEFENDANT AND EVEN IF SUCH EVIDENCE WAS ADMISSIBLE THE COURT SHOULD HAVE CHARGED THE JURY THAT THE USE OF SUCH EVIDENCE WAS NOT TO SHOW THAT THE APPELLANT HAD A DISPOSITION TO COMMIT CRIME OR HAD A VIOLENT OR BAD CHARACTER.

The government on the direct examination of Sampson elicited that early in the morning of December 11, 1975 the co-defendant Brown visited him and that they went to the appellant's home. There Sampson was shot by Brown and the appellant helped to have him removed to a hospital (143, 146, 147). The Court then instructed the jury that this did not relate to the kidnapping of Shepardson. The Court told the jury that it was relevant as to "intent", "consciousness of guilt", "common plan or scheme" and "the identity of Brown". The record is uncertain whether this evidence was confined to Brown. The Court did refer to a common plan or scheme and this could very well refer to the appellant.

Rule 404 of the Federal Rules of Evidence provides in subdivision (3)(b) that:

> "Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

But the Court never told the jury that the evidence was not to show a violent character on the part of the appellant or show that he had a bad character and was not a desirable person. See U.S. v. Grady, et al., U.S. Court of Appeals, Second Circuit, slip opinion October 27, 1976, at page 291 and page 302. This Court in part stated that evidence of subsequent similar acts may be admissible. However, this Court also stated:

> "...Such evidence is admissible if it's in the discretion of the trial judge..., or it is substantially relevant for a purpose other than showing the defendant's criminal character disposition and its probative weight outweighs its potential prejudicial impact. ..."

See also "Weinstein's Evidence, United States Rules, Volume 2, Weinstein and Berger",Section 404 (10), pages 404-73, 404-74. There the authors state that "this kind of dynamite" may be outside the limits of judicial discretion. The authors also suggest that such evidence be inadmissible unless the prosecution proves it's essential in order to show an element of the crime committed and is not cumulative. See also U.S. v. Deaton, 381 F. 2d 114, 117 (Cir. 2d, 1967).

In Deaton this Court delineated the conditions under which evidence of other occurrences or similar acts can be admitted. Thus Deaton held that such evidence is admissible depending on on balance, of the actual need for the other crimes evidence in the light of other issues, the persuasiveness of such evidence, that the defendant was the perpetrator, to be counterposed to the issue as to whether the jury would be inflamed and become hostile to the accused thereby adversely affecting the impartiality of the jury.

The shooting of Sampson was irrelevant to the charged crime. That crime was kidnapping. There was evidence given that prior and during the commission of that crime, the defendants were armed. The prosecution's theory was that Shepardson was part of a fraudulent transaction which enraged the appellant. The prime issue was whether Shepardson was cajoled or forced into the car. With Shepardson's past before the jury this evidence served to merely show that the defendants were of a bad and violent character thus being the type who would kidnap the victim. Consequently this evidence must have impressed the jury that whether they believed Shepardson or not, the appellants were vicious people.

It is respectfully submitted that assuming the probity of this evidence it was outweighed by a severe prejudicial impact on the jury.

However, if the evidence were relevant for some purpose, it is further submitted that under Rule 403 of the Federal Rules of Evidence, the probity was substantially outweighed because of the resulting prejudice. Referring again to "Weinstein's

Evidence", Volume 2, at pages 403-15; 403-16, it is suggested that:

> "In the absence of redeeming probative value, exclusion of evidence because of its capacity for prejudice has long been the practice."

That authority then goes on to define unfair prejudice as having a "undue tendency to suggest decision on an improper basis, commonly though not necessarily an emotional one." It refers to the outweighing of probity by prejudice as characterizing such evidence as stimulating horror in the jury, stimulating a desire to punish and diverts the jury from the main issues of the case.

POINT IV:

The appellant, ANTHONY L. CAVALLARO, pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, respectfully adopts all points advanced by the co-appellant in this case insofar as those points are applicable to the appellant's appeal.

CONCLUSION:

IT IS RESPECTFULLY SUBMITTED, THAT THE JUDGMENT OF CONVICTION APPEALED FROM SHOULD BE REVERSED.

Respectfully submitted,

JOEL A. SCELSI
Attorney for Appellant
ANTHONY L. CAVALLARO

SCELSI

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides a 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 31 day of Jan. 1977 deponent served the within Brief upon

U.S. Atty., Northern Dist. of NY

attorney(s) for
Appellee

in this action, at
Federal Post Office Building,
Utica, N.Y. 13503

the address(es) designated by said attorney(s) for that purpose by depositing _____ copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 31 day
of Jan. 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978